



March 24, 2022

Senator Gary A. Winfield, Chair, and Representative Steven J. Stafstrom, Chair  
Joint Committee on Judiciary  
Legislative Office Building, Room 2500  
Hartford, Connecticut 06106

**Re: HB 5463, An Act Concerning the Authority of The Office of The Attorney General to Bring an Action Against a Seller Who Engages in Price Gouging During a Disaster or Emergency**

Dear Chair Winfield, Chair Stafstrom, and Members of the Committee:

Thank you for the opportunity to offer the following comments relative to HB 5463. I am providing these on behalf of the American Petroleum Institute ("API").

API represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs. Our nearly 600 members produce, process, and distribute most of the nation's energy, and participate in API Energy Excellence, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. Formed in 1919 as a standards-setting organization, API has developed more than 700 standards to enhance operational and environmental safety, efficiency, and sustainability.

Background

Price gouging laws are a tool that states use to protect consumers from potentially paying excessive prices for goods and services that are impacted during emergencies. "Price gouging" is a term commonly used to refer to sellers inflating prices to "unfair" levels to take advantage of certain circumstances causing a decrease in supply, including emergencies.<sup>1</sup> One of the challenges associated with this type of legislation is defining price gouging.<sup>1</sup>

There is no federal law that broadly prohibits price gouging. Approximately 35 states have some manner of anti-price-gouging statute or regulation. Generally speaking, there are three types of state anti-price gouging laws: (1) A "percentage increase cap" limit, which fixes post-disaster prices based on pre-disaster prices; (2) an "outright ban" on any increase in price above what is necessary; (3) and a ban on "unconscionable" price increases.<sup>2</sup> Most states' price-gouging laws are only enforceable by the state and result in fines and restitution.

One of Connecticut's anti-price gouging statutes<sup>3</sup> - Conn. Gen. Stat. § 42-230 - currently states that, "no person, firm or corporation shall increase the price of any item ... at retail ... in an area which is the subject of any disaster emergency declaration issued by the Governor," with the exception of price fluctuations during the "normal course of business."

Section 1 of HB 5463 proposes to amend Conn. Gen. Stat. § 42-230 by providing that "[n]o seller shall sell ... any item within the chain of distribution for an amount that represents an unconscionably excessive price at any location in an area which is the subject of any precipitating event." The definition of "seller" is expanded to

<sup>1</sup> Vann and Ruane, *Gasoline Price Increases: Federal and State Authority to Limit "Price Gouging"* Congressional Research Service RS22236 (August 23, 2011).

<sup>2</sup> Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 Entrepreneurial Bus. L.J. 79, 83-84 (2009).

<sup>3</sup> There are five such laws currently in effect. See § 42-230, § 42-231, § 42-232, § 42-234, § 42-235 and discussion, *infra*.



include manufacturers, suppliers, wholesalers, distributors, or retailers, and a “precipitating event” includes a disaster or emergency declaration issued by the Governor or President. An “unconscionably excessive price” is defined as “(A) [there is] a gross disparity between the price for which an item was sold ... immediately prior to the precipitating event, (or when the precipitating event was reasonably anticipated), and the price for which such item is being sold ... during the period in which such precipitating event is in effect, and (B) the amount charged by the seller is not attributable to additional costs incurred by the seller in connection with the sale, rental or lease of an item.”

#### Abnormal Market Disruptions and Prices of Energy Resources - Unconscionably Excessive Price Prohibited

As a threshold matter, Conn. Gen. Stat. § 42-234 currently prohibits the sale of gasoline and fuel oil by the wholesaler, distributor, or retailer at an unconscionably excessive price during any period of abnormal market disruption with fines of up to \$10,000 per violation for “large sellers.” About a week ago, and as required by § 42-234, “[t]he Commissioner of Energy and Environmental Protection has provided notice to the Attorney General of an abnormal market disruption regarding the wholesale price of motor gasoline or gasohol. Pursuant to Conn. Gen. Stat. § 42-234, no seller of motor gasoline or gasohol shall sell, or offer to sell, an energy resource at an unconscionably excessive price between March 19, 2022, and April 18, 2022.” This notice is posted and highlighted on the Attorney General’s homepage.<sup>4</sup>

There may be reason to amend Conn. Gen. Stat. § 42-230 as it applies to the sale of other necessities, but because the sale of petroleum fuel at an unconscionably excessive price during an abnormal market disruption as described is already prohibited by § 42-234, any such amendment should specifically exempt such sales from § 42-230.<sup>5</sup> To do otherwise would further confuse an already complicated Chapter on Profiteering.<sup>6</sup>

#### Unconscionably Excessive Price

Price gouging is complex – it is challenging to prohibit legislatively – and its enforcement is equally nuanced and challenging.<sup>7</sup> This is particularly true given the complex nature of the gasoline industry. But the definition

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<sup>4</sup> at <https://portal.ct.gov/AG>.

<sup>5</sup> See § 42-235 (e) for example: “(e) A seller of an energy resource, as defined in subsection (a) of section 42-234, shall be exempt from the provisions of this section.”

<sup>6</sup> See Chapter 743H. Profiteering at [https://www.cga.ct.gov/current/pub/chap\\_743h.htm](https://www.cga.ct.gov/current/pub/chap_743h.htm).

Sec. 42-230. (Formerly Sec. 21a-78a). Retail prices during an emergency.

Sec. 42-231. Governor's proclamation of supply emergency. Imposition of price restrictions or rationing. Legislative disapproval.

Sec. 42-232. Prohibition on sale of product or service or energy resource at excessive price during supply or energy emergency. Penalty.

Sec. 42-233. Petition for exemption. Commissioner's responsibilities. Appeal. Regulations.

Sec. 42-234. Abnormal market disruptions and prices of energy resources. Definitions. Unconscionably excessive price prohibited. Attorney General notice re abnormal market disruption. Abnormal market disruption upon increase in price of gasoline. Fines on large sellers of gasoline. Ability of Commissioner of Consumer Protection or courts to establish acts or practices as unfair or unconscionable not limited.

Sec. 42-234a. Abnormal market disruptions and prices of energy resources: Civil actions by Attorney General; unfair trade practice.

Sec. 42-234b. Price of petroleum products not to include amount in excess of tax liability. Enforcement by Commissioner of Consumer Protection. Unfair trade practice.

Sec. 42-235. Proclamation of severe weather event emergency. Unconscionably excessive price for sale of consumer goods and services during severe weather event emergency prohibited. Determination of violation. Exemption. Unfair trade practice.

<sup>7</sup> See 161 Am. Jur. Trials 551 (Originally published in 2019). Litigation about possible price-gouging will be heavily dependent on discovery to ascertain pricing information about the item in question during the relevant emergency period, as well as prior to any disaster, and within and without the trade market area. In preparing a report, an expert might consider including the following:



“unconscionable” in HB 5463 through its dependence on the meaning of “gross disparity” creates confusion, making it difficult for both gasoline retailers and wholesalers to determine if they have engaged in price gouging. Gross disparity is an inherently vague term that is difficult to define, especially in the context of petroleum markets where fluctuations in the price of gasoline regularly result in changing “normal” price levels.<sup>8</sup> These fluctuations make it difficult to consistently apply a uniform definition of price gouging.<sup>9</sup>

Petroleum industry pricing is an enormously complicated matter not subject to simple explanation, even absent the disruptive effects of a major natural disaster. Refiners vary significantly in terms of where, and through which channels, they distribute product. That, coupled with ever changing market conditions, makes it next to impossible to establish a regular price “at which the same or similar petroleum product is readily obtainable by other buyers in the trade area” for comparison purposes without considering additional information.

Under the unconscionably excessive price standard, the difference between an acceptable price for goods in short supply during an emergency and unacceptable profiteering seems to come down to a sense of “I know it when I see it.”<sup>10</sup>

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- An analysis of economic data to ascertain if the defendants priced the targeted product at competitive levels during the relevant time frame;
  - A description of the geographical layout of the area in question and the number of distributors of the product and their locations;
  - An assessment of additional costs associated with transportation, additional wages for employees, or other costs caused by the emergency or other circumstances that arose at the time of the emergency;
  - A table of comparison of daily/weekly/monthly prices of the item/service in question;
  - The source of price information;
  - Additional costs incurred in selling the product in the relevant area compared to selling the product in nearby communities;
  - The wholesale costs of the product in the relevant time period;
  - The range of wholesale costs of the product in the relevant time period;
  - An examination of pricing fluctuation explained by seasonal business patterns;
  - A comparison of the gross margins over the relevant period;
  - A comparison of the defendant's wholesale cost to prices charged over the one year before and one year after the emergency;
  - A comparison of the defendant's prices charged to those of its competitors within a 60-mile radius over the one year before and one year after the emergency;
  - An analysis of the defendant's inventory levels of the targeted product before, during, and after the emergency;
  - A discussion of pricing volatility in the general market for the targeted product;
  - National or international market trends that explain pricing volatility for the targeted item;
  - An analysis of whether the defendant is or was one of the larger sellers in the market area that could have or did operate with lower margins than its competitors; and
  - A conclusion as to whether the defendants engaged in price gouging.

<sup>8</sup> See Cale Wren Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws* at 4-5, addressing how markets reallocate pricing based upon supply and demand, (January 2008), see [www.etd.lib.montana.edu/etd/2008/davis/DavisC0508.pdf](http://www.etd.lib.montana.edu/etd/2008/davis/DavisC0508.pdf).

<sup>9</sup> See Michael A. Salinger, Dir., Bureau of Econ., Fed. Trade Comm'n, Address to Antitrust Committee of Boston Bar Association: *Moneyball and Price Gouging* (Feb. 27, 2006) (see [www.ftc.gov/speeches/salinger/060227MoneyballandPriceGouging.pdf](http://www.ftc.gov/speeches/salinger/060227MoneyballandPriceGouging.pdf)) at 5-6, articulating natural market equilibriums affect price of gasoline, thus no normative price exists. Also noting difficulty in articulating distinct definition of gouging. For example, “[g]ouging might be defined by reference to margin between price and some measure of cost” or as a pre-established percentage increase in price. See *Id.* While some definitions utilize the term “unconscionable,” it remains unclear as to how unreasonable a price must be to reach that level. See *Id.* Despite definitional imprecision, price gouging exceeds some undefined price ceiling retailers may charge for gasoline. See *Id.*, at 3.

<sup>10</sup> *Id.*, (noting difficulty in articulating distinct definition of gouging):

Just down the road at Boston University, where I have taught for many years, we do not teach “unconscionable” as a well-defined economic term. There are of course other fine schools in the area. I know less about the details of what they teach, but I would be surprised if they teach their students an economic definition of “unconscionable.” As far as



While other states rely on the term “unconscionable” to define unlawful price increases, problems arise when a price increase is categorized as unconscionable in the petroleum market because there are no clear meanings associated with the term as it applies to fuel sales and it is difficult to tell where the line is between unconscionable price and a normal fluctuation in price. Stated differently, it remains unclear as to how unreasonable a price must be to reach that level.<sup>11</sup>

### Neighboring State’s Experience

Massachusetts’s experience when attempting to enforce an anti-price gouging law is a typical result of states that use “unconscionable” language – when state actors follow up on an alleged gasoline hike, it is almost impossible to draw a line to show when an increase in price is enough to bring a prosecution.<sup>12</sup> In part fueled by media speculation following Hurricane Katrina, the state’s administration acted aggressively to investigate gasoline sales and stop unlawful price increases through its anti-gouging regulation.<sup>13</sup> The Office of Consumer Affairs presented the Attorney General with approximately forty-six complaints alleging violations of the anti-gouging regulation. Nevertheless, to the best of our knowledge, government agencies and officials did not confirm instances of gasoline price gouging in Massachusetts as a result of that investigation.<sup>14</sup> And in *White v. R.M. Packer Co.*,<sup>15</sup> a Massachusetts District Court acknowledged that the regulation’s definition of “unconscionable,” and its use of the term “gross disparity,” were imprecise and observed the difficulty in interpreting the regulation due to the unclear terms in its language). Again, gross disparity itself is an inherently vague term that is difficult to define, especially in the context of petroleum markets where fluctuations in the price of gasoline result in new “normal” price levels every few months.<sup>16</sup>

### Recommended Amendment

To that end, below please find suggested amendments to HB 5463 which would provide some clarity for the energy resource sector. The amendments consist of exempting sellers of energy resources from 42-230 since the sale of petroleum fuel at an unconscionably excessive price is already prohibited by 42-234, and adding several provisions to 42-234 establishing when a price is not an “unconscionably excessive price” that were included in Kentucky’s statutory prohibition on price-gouging. Any price subject to or within those provisions would be, by definition, within normal conduct in non-emergency situations that does not reflect an attempt to take

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I can tell, placing the term in a statute gives a district attorney or, in the case of a federal statute, a US attorney the right to go after whichever gas stations charge the highest prices.

<sup>11</sup> Judge Posner commented on the ambiguity of price-gouging definitions, stating that “more than half the states have laws forbidding ‘price gouging,’ often defined with unpardonable vagueness as charging ‘unconscionably’ high prices.” See Richard Posner, *Should Price Gouging in the Aftermath of Catastrophes Be Punished*, BECKER-POSNER BLOG (Oct. 23, 2005) (criticizing definitional inadequacies of anti-gouging statutes). <https://www.becker-posner-blog.com/2005/10/>. Elected officials have attempted to clarify the definition of price gouging as it pertains to the sale of gasoline, but those explanations often serve to confound the topic. See Michael A. Salinger, Dir., Bureau of Econ., Fed. Trade Comm’n, Address to Antitrust Committee of Boston Bar Association: *Moneyball* and Price Gouging 2 (February 27, 2006) (see <http://www.ftc.gov/speeches/salinger/060227MoneyballandPriceGouging.pdf>) (noting difficulty in articulating distinct definition of gouging). See Matt Zwolinski, *The Ethics of Price Gouging*, 18 BUS. ETHICS Q. 347, 349 (2008) (explaining difficulty pinpointing exact meaning of “unconscionable”).

<sup>12</sup> Emily Bae, *Are Anti-Price Gouging Legislations Effective Against Sellers During Disasters?*, 4 Entrepreneurial Bus. L.J. 79, 86–87 (2009).

<sup>13</sup> Massachusetts, 940 Mass. Code Regs. § 3.18, Mass. Gen. Laws Ann. Ch. 93A, § 2.

<sup>14</sup> See Cale Wren Davis, *An Analysis of the Enactment of Anti-Price Gouging Laws*, (January 2008), see <http://etd.lib.montana.edu/etd/2008/davis/DavisC0508.pdf> (discussing morality implications associated with gouging) note 24, at 47 (inferring allegations failed to meet bar set by regulation). “Jesse Caplan of the Attorney General’s Office said his office used ‘significant resources’ in the price gouging investigation, but no suits were filed.” *Id.*

<sup>15</sup> 635 F.3d 571, 587-89 (1<sup>st</sup> Cir. 2011); *White v. R.M. Packer Co.*, No. 07-11601, slip op. at 11-14 (D. Mass. January 6, 2010).

<sup>16</sup> See Davis, *supra* note 24, at 4-5 (addressing how markets reallocate pricing based upon supply availability and demand of product).



advantage of consumers during an emergency. If a price is outside of those provisions, then it seems appropriate to subject it to the “unconscionably excessive” standard and let a court decide whether the conduct is or is not excusable. In short, it is difficult to define what price gouging is and provide meaningful guidance on that basis, but we believe that it is easier to define - and reach consensus on - what is not price gouging using our amended language. The amendments are attached for your review, along with Kentucky’s law.

Conclusion

Thank you for this opportunity to provide comments with respect to the bill as introduced. Please note that I would be happy to discuss these amendments with you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'David O'Donnell', is written over a light gray circular background.

David J. O'Donnell  
Associate Director



Amendments to HB 5463

After line 39, add the following new subsection (c):

(c) A seller of an energy resource, as defined in subsection (a) of section 42-234, shall be exempt from the provisions of this section.

In line 40, add the new Section 2:

Section 2. Subsection ( e ) of section 42-234 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2022*):

(e) (1) Notwithstanding the provisions of subsections (b) and (c) of this section, it shall not be a violation of this section if a seller sells or offers to sell motor gasoline during an abnormal market disruption or any period in which an imminent abnormal market disruption is reasonably anticipated if the seller's average margin for such motor gasoline during the longer of the following: (1) Any such period of abnormal market disruption or imminent abnormal market disruption, or (2) thirty days following the date notice was provided by the Attorney General pursuant to subsection (d) of this section, is not greater than such seller's maximum margin on the sale of such motor gasoline during the ninety-day period prior to the onset of the abnormal market disruption or period in which an imminent abnormal market disruption is reasonably anticipated.

(2) Notwithstanding the provisions of subsections (b) and (c) of this section, a price is not unconscionably excessive if it is: (i) related to an additional cost imposed by a supplier of a good or other costs of providing the good, including an additional cost for labor or materials used to provide a good; (ii) ten percent or less above the price prior to the inception of the abnormal market disruption; (iii) ten percent or less above the sum of the seller's costs and normal markup for a good; (iv) generally consistent with fluctuations in applicable commodity, regional, national, or international markets, or seasonal fluctuations; or (v) a contract price, or the result of a price formula, established prior to the inception of the abnormal market disruption.

In line 127, add a new Section 3

Section 3. Section 42-234, as so amended, is further amended by adding at the end thereof the following subsection:

(i) Whether a price is unconscionably excessive is a question of law. In determining if a violation of this section has occurred, the court shall consider all relevant circumstances, including prices prevailing in the locality at that time.



Kentucky Price Gouging Law

Ky. Rev. Stat. Ann. § 367.374 (West)  
**Effective: February 2, 2021**  
KRS § 367.374

367.374 Sale or rental of goods and services during declared state of emergency; fifteen-day prohibition against grossly excessive prices; additional fifteen-day extensions to protect citizens; application of section

(1) (a) When a Condition Red has been declared by the United States Department of Homeland Security under the Homeland Security Advisory System or the Governor has declared a state of emergency under KRS 39A.100, the Governor may implement this section by executive order for a period of fifteen (15) days from notification of implementation, as required by KRS 367.376. The order implementing this section shall be limited to the geographical area indicated in the declaration of emergency. The Governor may terminate or limit the scope of the order at any time.

(b) No person shall sell, rent, or offer to sell or rent, regardless of whether an actual sale or rental occurs, a good or service listed in this paragraph or any repair or reconstruction service for a price which is grossly in excess of the price prior to the declaration and unrelated to any increased cost to the seller. Goods and services to which this section applies are:

1. Consumer food items;
2. Goods or services used for emergency cleanup;
3. Emergency supplies;
4. Medical supplies;
5. Home heating oil;
6. Building materials;
7. Housing;
8. Transportation, freight, and storage services; and
9. Gasoline or other motor fuels.

(c) A person's price does not violate this subsection if it is:

1. Related to an additional cost imposed by a supplier of a good or other costs of providing the good or service, including an additional cost for labor or materials used to provide a service;
2. Ten percent (10%) or less above the price prior to the declaration;
3. Ten percent (10%) or less above the sum of the person's costs and normal markup for a good or service;
4. Generally consistent with fluctuations in applicable commodity, regional, national, or international markets, or seasonal fluctuations; or
5. A contract price, or the result of a price formula, established prior to the order implementing this subsection.



(d) Whether a price violates this subsection is a question of law. In determining if a violation of this subsection has occurred, the court shall consider all relevant circumstances, including prices prevailing in the locality at that time.

(2) The provisions of this section may be extended for up to three (3) additional fifteen (15) day periods by the Governor, if necessary to protect the lives, property, or welfare of the citizens.

(3) If a person sold or rented a good or service listed in subsection (1) of this section at a reduced price in the thirty (30) days prior to the Governor's implementation of this section, the price at which that person usually sells or rents the good or service in the area for which the declaration was issued shall be used in determining if the person is in violation of this section.

(4) If a person did not sell or rent or offer to sell or rent a good or service listed in subsection (1) of this section prior to the Governor's implementation of this section, the price at which a good or service was generally available in the area for which the declaration was issued shall be used in determining if the person is in violation of this section.

(5) Nothing in this section shall be affected by the requirements of KRS 39A.090.

The existing Section 2 of the bill is now renumbered to become Section 4.

The existing Section 3 of the bill is now renumbered to become Section 5.